IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 425

LUCIUS POWERS and W. E. URICK, *Petitioners*,

v.

CHESTER BOWLES, Price Administrator.

On Petition for a Writ of Certiorari to the United States Emergency Court of Appeals

PETITIONERS' REPLY BRIEF

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Citations

* Refers to footnotes.

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PETITIONERS' REPLY BRIEF

A. The Respondent's Failure to Comply with the Statutory Requirements may not be Ignored or Excused.

Petitioners were, and still are, of the opinion that the record in this case presents certain fundamental issues which are in no way dependent upon details of actual prices and mark-ups. However, the respondent, in his opposition brief (p. 5), asserts that the legal issues "may be evaluated

only in the light of an examination of the maximum prices in question and their relationship to historic price levels." *He then injects prices as an excuse for his failure to comply with the statute.* He does this by submitting the price range for Emperor grapes—the variety grown by petitioner Powers. He notes (Brief, 7) that the maximum price of $2.05, applicable to all table grapes under the regulation in question, was "sharply above even the high 1942 price for Emperors", that price being quoted as ranging from $1.50 to $1.80 per 28-pound lug or package.

Thus, the respondent would minimize the importance of, or entirely circumvent, the statutory requirement that the Secretary of Agriculture must determine and publish the highest price received by producers of California table grapes between January 1 and September 15, 1942. He does this by asserting that the maximum price established by the regulation is, after all, higher than the highest price received for Emperor grapes in 1942. In other words, he would have the Court believe that the producers are not injured by his failure to abide by the mandate of the statute. *He does not contend that there was even an attempt to comply with the statutory requirement of a publication and determination of the "highest price" and of the establishment of a maximum price based upon that as a minimum.* Even though this sort of argument were sound it would fail in the light of the true facts.

The only place that a price range of $1.50 to $1.80 for Emperor grapes appears *in the record* is in the opinion of the Emergency Court. (R. 66.) It is not even disclosed where the Court obtained the figures but, from respondent's brief (p. 6n), it appears that they were obtained from page 15 of a publication known as "Grapes, 1942," published by the Federal-State Market News Service. This publication is a type of marketing service giving price information and trade news concerning the grape industry. The particular issue to which reference is made covers *29 mimeographed letter-size pages*, no portion of which is a part of the rec-

ord in this case. Therefore, it would appear that the Emergency Court has taken judicial notice of only so much of the publication as suited its purpose.

This reliance by the lower court, and now by the respondent in his opposition brief, upon a minute excerpt from a publication not of record and not enjoying the dignity of a document which might be judicially noticed[1] shows the wisdom of the statement of this Court in the case of the *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U. S. 292, 302, 81 L. ed. 1093, 1100, quoted in petitioners' brief (p. 34n). The practice is there decried of referring to "price lists or trade journals or even government reports" without putting them in evidence so that there may be "an opportunity in connection with a judicial review of the decision to challenge the deductions made from them."

If the said publication were in evidence in this case it would be shown that the $1.50 to $1.80 price range related to U. S. #1 Emperor grapes, which are actually of second grade, instead of the standard grade which is known as "United States Fancy". This grade would be seen ("Grapes", p. 19) to have sold at a price range of between $1.93 and $3.20, the average for more than 660,000 packages being $2.81. Inasmuch as this price includes 60¢ for refrigeration and freight the f.o.b. price would be $2.21. But this *average* is considerably higher than the $1.80 *high* price for Emperors used by the lower court and cited by the respondent.

[1] The respondent cites *Shapleigh v. Mier*, 299 U. S. 468, in an apparent effort to support the action of the lower court in taking judicial notice of certain material not of record, notably data contained in the above-mentioned publication "Grapes, 1942". (Opposition Brief, p. 4n.) That case involved judicial notice of the land laws of Mexico and only a general statement appears (p. 475) regarding such notice of "an event or a custom or a law of some other government". But for a pertinent and much fuller discussion of the subject of judicial notice, and one that does not support the respondent's contention, see the later case of *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U. S. 292, 301-303, 81 L. ed. 1093, 1100-1101.

It would also be seen ("Grapes", p. 18) that for a period of 13 weeks from June 14 to September 12, 1942, the auction sales of *all varieties* of California table grapes in eastern cities enjoyed a weighted average weekly price range of from $2.04 to $5.20, resulting in a simple average of $3.44. Inasmuch as this figure includes 60¢ per package for refrigeration and freight, the f.o.b. price would be $2.84, which is a great deal higher than the $2.05 ceiling established by the respondent for all varieties.

Petitioners call attention to the fact that, although they personally deal only in Emperors and other choice varieties of table grapes, the regulation sets one average price for all varieties and grades. The regulation thus affects all members of the California table grape industry, a substantial number of whom produce top grade ("United States Fancy") grapes for table use.

Petitioners do not make the foregoing references to the publication "Grapes" with any suggestion that it is, or should become, a part of the record herein. They merely do so to show the injustice of permitting reference to a market report or a trade journal, no portion of which is properly before the Court. These references also emphasize the propriety of petitioners' contention that the legal issues involved may be settled without regard for price or mark-up details. The prices mentioned[2] were not determined and published by the Secretary of Agriculture and so may not be used for the establishment of maximum prices under the Price Control Act, but if they were to be used, as contended by the lower court and the respondent, the true figures should be quoted and the manifest unfairness of the $2.05 price he made apparent.

The respondent complains (Brief, 11): "Petitioners refer to no statutory provision which lends support to the suggestion that any action by the Secretary of Agriculture

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[2] It should be observed that the figures quoted are for 1942 and that, according to allegations in the present record (R. 6), labor costs have since increased approximately 60%.

other than the approval of maximum price regulations governing agricultural commodities expressly provided for in Section 3(e) of the Emergency Price Control Act should constitute a condition precedent to the establishment of maximum prices." Such an assertion involves a total disregard for the statutory requirement of Section 3 of the Stabilization Act (Petition, 12; Opposition Brief, 28-29) requiring that no maximum prices shall be established for agricultural commodities below a price which will reflect to producers "the higher" of certain prices "as determined and published by the Secretary of Agriculture". The mere fact that the Secretary may have approved certain maximum prices as required by Section 3(e) of the Price Control Act (Opposition Brief, 22) does not set aside[3] the statutory requirement of prior determination and publication of certain prices, nor does it prove that the maximum prices established are not below the higher of such pertinent prices as may have been determined and published.

The respondent further seeks to excuse the failure of the Secretary of Agriculture to publish and determine the required prices in this case, and also his own disregard for the requirement, by explaining (Brief, 12) that the prices for table grapes "have been periodically determined and published by the Secretary of Agriculture", but that "For most agricultural commodities *monthly average* prices received by producers are determined and published", and that "For some of the seasonal commodities,

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[3] As stated by this Court in the famous Arlington case, *United States v. Lee*, 106 U. S. 196, 220, 27 L. ed. 171, 182:

> "*No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity.* All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.
>
> "It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives." (Emphasis supplied.)

including grapes, the determination of prices received by producers has *customarily* taken the form of a *season average* price." He then alleges that Congress intended that the price standards prescribed should be based upon "this settled administrative practice" because certain tables setting forth the "season average price" were submitted to the Senate Committee during the discussions leading to the passage of the Stabilization Act. Such assertions answer themselves. It should not be necessary to point out that Congress did not use the word "average" but, instead, provided that the minimum price should be "the higher of the following prices," including "The highest price received" by the producers of the regulated agricultural commodities between January 1 and September 15, 1942.

The respondent then seeks to answer petitioners' contention (Petition, 20-23) that even if the respondent had the authority to establish maximum prices for California table grapes (through the determination and publication of the required prices by the Secretary of Agriculture) he had no authority to establish a single price based on an *average 1942 season price for all varieties*. He claims that this alternative contention fails for a number of reasons, all of which, to use respondent's pet phrase, "lack substance". In fact, they might be regarded as frivolous.

"In the first place," says the respondent, "petitioners have referred to no price determined by the Secretary which is inconsistent with the regulation." (Opposition Brief, 13.) Obviously, this is not the duty of the petitioners. The question is not whether *any* price which the Secretary may have determined is *in*consistent with the regulation, but it is a question of whether the respondent based his regulation upon *the higher* of certain prices determined by the Secretary. The ascertainment of such prices is the initial duty of the respondent. It is an affirmative duty; it obviously may not be escaped by shifting it to the petitioners as a negative duty.

The respondent next refers (Brief, 13) to petitioners' "concession" that the record does not disclose the

highest table grape price between January 1 and September 15, 1942, and he follows with the statement that under Section 204(b) of the Price Control Act petitioners have the burden of establishing that the regulation is not in accordance with law. This is merely another case of where the respondent endeavors to escape the responsibility of establishing authority for his own act.

The statute clearly states that "No maximum price shall be established or maintained" except under the conditions outlined. Thus, it was the respondent's duty to see that the conditions were fulfilled before he attempted to establish the maximum prices in question. He recognized this duty in the case of lettuce and cabbage. (R. 35-36; Petition, 18n, 21-22.) For both products he specifically cited the parity price and also the "highest price" between January 1 and September 15, 1942. The fact that he did not do so in the case of California table grapes can lead to but one conclusion—either the "highest price" had not been determined, or *it was higher than the respondent desired as a minimum for his maximum prices.*

Certainly the petitioners could not know the "highest price" as determined by the Secretary of Agriculture *if such a price had not been published.* They knew that the highest price, or even the season average price, was higher than the $2.05 maximum imposed by the respondent, but their knowledge was not based upon any determination and publication by the Secretary of Agriculture. *If* the figures appearing in the aforementioned publication "Grapes, 1942," were to be considered a fulfillment of the statutory condition, and *if* those figures were, *in their entirety*, a part of this record, or *if* the said publication were a proper subject for judicial notice, it would appear conclusively that the maximum price established by the respondent fell far short of complying with the statutory requirement as to the minimum which might be permitted.

B. The Authority of the Respondent is Properly in Issue.

The authority to issue a regulation may not be conferred upon the respondent either by waiver or by the consent of the parties. The inherent authority of the respondent is essential as a foundation for any action based thereon and without which such action must be considered a nullity from its inception. Even as a court must depend upon the Constitution or upon a statute for its jurisdiction, which cannot be conferred or enlarged by any other means and may be questioned at any time by the parties or by the court itself, so the authority of the respondent herein to issue a pa icular regulation must depend upon the Emergency Price Control Act, as amended by the Stabilization Act. If it be not within the limits therein prescribed, any action presumably grounded thereon must fail regardless of whether objection was specifically made thereto in a protest filed with the Administrator, or even in a complaint presented to the Emergency Court of Appeals.

The duty of the respondent and the conditions under which he may issue a regulation such as that here involved are clearly apparent in the statute itself. The fact that the conditions were not fulfilled by which the necessary authority would have been conferred upon him to issue the regulation in question is evidenced by the record. The respondent's claim that he need not comply with the statutory requirements as long as the Secretary of Agriculture approves the regulation in its final form presents an issue of law. This is squarely presented to this Court by the Petition herein (p. 5).

Under Section 204(d) of the Price Control Act judgments of the Emergency Court are made subject to review by this Court in the same manner as a judgment of a Circuit Court of Appeals as provided in Section 240 of the Judicial Code, as amended (28 U. S. C. § 347). That Section grants to this Court the same right of review as if the case were brought here "by *unrestricted* writ of error or appeal." Thus it has been held that this Court, on certiorari, must

determine whether the lower court had *jurisdiction* although that question was *not raised by counsel in either court. Shanferoke Coal & Supply Corporation v. Westchester Service Corporation*, 293 U. S. 449, 451, 79 L. ed. 583, 586.

Therefore, the issue of the respondent's jurisdiction or authority to promulgate the regulation in question is properly before this Court.

C. This Case Presents a Justiciable Controversy.

The petitioners frankly admit (Petition, 35) that the only real benefit which they and other members of the California table grape industry will derive from a declaration by this Court that the "season-average" single-price basis is in violation of the statute will be the effect which it will have in preventing the respondent from adhering to and continuing such an invalid basis. This is because there is no provision of law whereby petitioners may recover such losses as they have already incurred as a result of their operations under the regulation during the 1943-1944 season, even though the regulation may be declared wholly invalid. "Consequently," the respondent observes (Brief, 15-16), "it does not appear that petitioners' objection to the date of establishing price control for the 1943 table-grape season now presents a justiciable controversy meriting review in this Court."

In support of his contention, which is directed only to the due process issue based upon the establishment of price control after the 1943 season was well under way, the respondent cites the decision of this Court in *State of California v. San Pablo & Tulare Railroad Company* (1893), 149 U. S. 308, 314, 37 L. ed. 747, 748. That was a suit to recover taxes assessed by the State. When the case was called for argument it appeared that the cause of action had ceased to exist because of the payment of the taxes in controversy. This Court said that it was not empowered "to decide moot questions or abstract propositions, or to de-

clare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." Obviously, this ruling does not bar the review of the issues here presented; they continue to exist and will probably so continue to a greater or less degree as long as there is price control of agricultural commodities, or until they are resolved in favor of petitioners' contentions.

Petitioners have already called attention (Petition, 34n) to the fact that the regulation in question has not only continued in theory, but was even made more objectionable by an amendment which retained the season-average single-price basis and even reduced the already inadequate return to producers. It was also issued after the season was well under way, as in the case of the regulation which it superseded.

It should be parenthetically noted that the objectionable regulation has been temporarily suspended or revoked by Amendment No. 61 (9 F. R. 12,341) to Maximum Price Regulation 426, which amendment was issued October 9, 1944, and removed table grapes from price control. The reasons given in the statement of considerations involved are significant:

> ". . . This is primarily due to the inability of the Price Administrator to establish maximum prices for juice grapes for shipment. The Economic Stabilization Director has directed the Price Administrator not to establish ceiling prices for juice grapes, *because it is too late in the season, and because to do so would penalize late shippers and growers who have not already disposed of their grapes.*
>
> "The War Food Administration's raisin program has caused an abnormal demand for all grapes, including table grapes, for commercial wine-making. In the absence of ceilings on juice grapes for shipment, prices for all grapes to wineries have risen greatly. This has caused a marked diversion of table grapes away from sales for table use, and has invited those growers to bypass their shippers to sell to the wineries direct. In

addition, the return to growers of juice grapes has been much greater than the return to growers selling to the fresh market, due to the ceiling on the latter sales.

"Inasmuch as there are to be *no ceilings on juice grapes* for shipment, the conclusion is necessary that *maintenance of ceilings on table grapes for table use is discriminatory and inequitable.* . . ." (Emphases supplied.)

It thus appears that the removal of table grapes from price control was not due to any conviction on the part of the respondent that the objectionable season-average single-price basis should be discontinued. Instead it was due to the decision of the Economic Stabilization Director that it was too late in the season to establish ceiling prices for *juice* grapes because to do so would penalize late growers and shippers who had not already disposed of their crops. (Why such late imposition of ceiling prices was not held likewise to penalize table grape producers does not appear.) Therefore, only because the absence of ceilings on juice grapes caused a diversion of table grapes to the wineries, due to the high prices there obtainable as compared with the low ceiling on table grapes, were the latter removed from price control.

It is evident, and petitioners are convinced, that the objectionable regulation, with its invalid basis, will be reinstated, in effect, in time to control table grapes harvested in 1945 unless such action is discouraged by this Court. Indeed, there is nothing to prevent the reinstatement or reissuance of the objectionable regulation at any time—just as the respondent's fancy may dictate. Therefore, if the respondent's protested theory and practice be not now declared invalid it will mean that they may not again be brought into question until the regulation is reinstated or reissued, or its objectionable price basis continued in some other form. Then would follow the inevitable administrative delays culminating in denial of the protest as before,

and then appeal to the courts, accompanied by respondent's contention that the case is moot because the season is over or because he may have suspended the regulation after the damage, or much of it, has been done.

Certainly, if the right of a producer of a seasonal agricultural commodity to contest a regulation, through a review by this Court, may be removed either by the delays in the procedure provided or by the simple expedient of temporarily suspending or revoking the regulation, the statutory right of review becomes a mockery, and the control of an industry is made subject to the whims of an administrative officer of the Government.

Petitioners contend, therefore, that the case presents a justiciable controversy notwithstanding the time which has elapsed from delays over which they had no control, because the fundamental objection, namely, the authority of the respondent to establish a maximum price according to a basis different from, and less favorable than, the basis provided by the statute, is an objection which will continue until affirmatively met by the respondent or sustained by this Court, and also because a contrary contention would, for all practical purposes, invalidate the right of review prescribed by Congress.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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